APPENDIX

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6940

July Term, 1962

INTERNATIONAL HARVESTER COMPANY, a corporation;

PHILLIPS PETROLEUM COMPANY, a corporation;

DE LUXE CHECK PRINTERS, INCORPORATED, a corporation;

SUNSHINE BISCUIT COMPANY, INC., a corporation;

SEALRIGHT-OSWEGO FALLS CORPORATION, a corporation;

and

JONES & LAUGHLIN STEEL CORPORATION, a corporation,
Appellants,

vs.

THE CITY OF KANSAS CITY, KANSAS, a municipal corporation;

ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas;

JAMES L. CONROY, County Clerk of Wyandotte County, Kansas; and

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WYANDOTTE, KANSAS, *Appellees.*

[Filed August 15, 1962]

Appeal from the United States District Court
for the District of Kansas

Leonard O. Thomas (J. Donald Lysaught and Ervin G. Johnston, and Stanley, Schroeder, Weeks, Thomas & Lysaught, of Counsel, were with him on the brief) for Appellants.

J. W. Mahoney, Assistant City Attorney, (C. W. Brenneisen, Jr., City Attorney, City of Kansas City, Kansas, was with him on the brief) for Appellees.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This suit was brought by corporate property owners within an area known as Fairfax Industrial District, which lies between Kansas City, Kansas, and the Missouri River, to have declared invalid an annexation ordinance. The plaintiffs claimed federal jurisdiction on the basis of diversity of citizenship[1] and violation of their rights under the fourteenth amendment to the United States Constitution.[2] It is asserted and not contested that the pecuniary repercussions of the annexation will amount to more than $10,000 in taxes assessed against each of the plaintiffs.

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[1] 28 U.S.C.A. 1332: "(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—

"(1) citizens of different states;

• • • "

[2] 28 U.S.C.A. 1331: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitutions, laws, or treaties of the United States.

• • • "

The trial court dismissed the action upon the grounds that plaintiffs, under Kansas law, had no capacity to maintain the action and had presented no justiciable question under federal law.

Although plaintiffs' complaint seeks multiple and varied relief and their appellate approach to the issues is equally broad we think the determinative questions can be simply stated thus: Under Kansas law, is it the duty of a county attorney to initiate judicial proceedings questioning the validity of a municipal annexation ordinance when demand upon him to do so is made by a property owner within the annexed area? Can such property owner, under Kansas law, attack the validity of an annexation ordinance upon allegation that the county attorney arbitrarily refuses to act? And finally, do the Kansas procedures pertaining to judicial review of the validity of annexation ordinances, viewed against the factual background of the case, amount to a denial of due process under federal law?

The Board of City Commissioners of the City of Kansas City passed the questioned ordinance, No. 41525, in 1958. The then county attorney, Martin, commenced an original proceeding in the District Court of Kansas in the nature of quo warranto to test the validity of the ordinance under General Statutes of Kansas 1949, 13-1602, but while the action was still pending he was succeeded in office by the appellee Foster. The attorney general of Kansas later intervened in the case, superseded the county attorney as the representative of the state, and moved to dismiss the proceeding because of the expense of this and prior litigation upon the problem (State ex rel. Fatzer v. City of Kansas City, 169 Kan. 702, 222 P. 2d 714; State ex rel. Martin v. City of Kansas City, 181 Kan. 870, 317 P. 2d 806) and in the public interest. The motion of the attorney general was granted and the proceeding was dismissed. State ex rel. Foster v. City of Kansas City, 186 Kan. 190, 350 P. 2d 37. Two of the present appellants there sought leave to

intervene as did Quindaro township, which had claimed the area within its domain, but were denied the right to proceed.

After an unsuccessful attempt to obtain a Writ of Certiorari from the United States Supreme Court, 363 U.S. 831, demand was made upon Foster to initiate further proceedings and, upon refusal, this action was filed in the United States District Court for the District of Kansas.

Case law in Kansas has firmly established the rule that the validity of a municipal annexation ordinance can be tested only by the state acting through one of its proper officers. In Smith v. City of Emporia, 168 Kan. 187, 211 P. 2d 101, a private citizen sought relief against an annexation ordinance of the City of Emporia. After an exhaustive review of Kansas cases the Supreme Court of that state held that the plaintiff lacked capacity to sue. Similarly, in Lampe v. City of Leawood, 170 Kan. 251, 225 P. 2d 73, it is stated:

> ". . . in this jurisdiction actions to inquire into the validity of the proceedings creating a municipal corporation, or modifying its boundaries, cannot be maintained by a private individual. They can be prosecuted only by the State acting through one of its proper officers, such as the county attorney or the attorney general. . . ."

Appellants would distinguish these authorities and hold them inapplicable because of allegations in the case at bar that demand was made upon the county attorney to institute an action, that the county attorney refused, and the additional claim that such refusal was arbitrary. We see no merit to these contentions.

Quo warranto proceedings are an exclusive remedy to test the city's exercise of its purportedly granted powers in Kansas and traditionally assert the interests of the sovereign in preventing the invasion of its prerogatives. In such an action, the state is the plaintiff and the county attorney and attorney general seek only the vindication of

the rights of the state, State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P. 2d 652, aff'd. 323 U.S. 32, 65 S. Ct. 9, 89 L. Ed. 25.

The power to institute such an action is one of discretion not compulsion and the proper public official has the duty not to prosecute an unmeritorious action. State ex rel. Foster v. City of Kansas City, Kansas, 186 Kan. 190, 350 P. 2d 37. If simple demand by a taxpayer would change this rule the responsibility of public officials would be meaningless. It is true that in Bobbett v. State, 10 Kan. 9 (1872) there appears dicta to the effect that an individual may compel or control quo warranto proceedings where he holds a particular (though undefined) right independently of that which he holds as a member of a public class. Such interest, however, cannot be that of citizen, resident or taxpayer nor, indeed, even a claimant for tort whose cause of action is dependent upon the extent of valid city boundaries. Horner v. City of Atchison, 93 Kan. 557, 144 P. 1010. Appellants here claim no interest except that of landowners which the annexed area.

The allegation in appellants' complaint that the refusal of the county attorney to institute proceedings was arbitrary appears only as a bald conclusion. The trial court interpreted (and we think correctly) the factual allegations of the complaint as indicating appellants' claim to be thus:

> "So it would seem that the plaintiffs feel that upon request to the county attorney to prosecute such an action the county attorney should commence an action, and if he refuses, he is arbitrary and capricious. An examination of the cases cited by counsel does not indicate in any manner that the county attorney's discretion must result in the same conclusion as a part of the public which he represents."

Appellants now argue,[3] but apparently for the first time, that opportunity should have been given them to show that the refusal to act by the county attorney was perhaps motivated by political expediency, lack of legal acumen or energy, corruption or disagreement with the desirability of the law itself. It is sufficient to say that the pleading of a bald conclusion unsupported by factual allegation will not save an otherwise fatally defective pleading and that in any event the traditional remedy for such conditions, should they exist, lies at the polls or in the more drastic steps for removal from office. We conclude that the trial court correctly held that appellants had no capacity to sue under Kansas law and that the action was properly dismissed as premised on diversity jurisdiction.

Having no private remedy under Kansas law is, appellants contend, a violation of due process under the fourteenth amendment. And certain it is that a state cannot legislate upon even a matter of complete state interest in such a manner as to abuse a federal constitutional right. Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110. But in the case at bar appellants' primary attack upon the validity of the Kansas City ordinance is limited to the claim that the ordinance violates state law. Federal courts do not review such a claim under the jurisdiction conferred by 28 U.S.C.A. 1331 and the result of error in the administration of state law, though injury may result, is not a matter of federal judicial cognizance under the due process clause of the fourteenth amendment. Here Kansas has provided and determined the powers, methods and procedures for the annexation of property by municipal corporations and the safeguards thought necessary to pro-

[3] This contention is presented only in the abstract. Any attempted proof in support of the theory would be faced head-on by the fact that in the earlier action the county attorney had been superseded by his superior, the attorney general, and the proceeding dismissed "in the public interest." State ex rel. Foster v. City of Kansas City, supra. It is difficult to see how under these circumstances the refusal of the county attorney to refile the action could be arbitrary.

tect against abuse. Such a subject is a proper one for state control and:

> "We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration of those to whom the state has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court."
>
> • • •
>
> "Municipal corporations are political subdivisions of the State. • • • For the purpose of executing these powers properly and efficiently they usually are given the power to hold • • • property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state • • • The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation • • • In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason • • • The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." Hunter v. Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151.

See also: Hagar v. Reclamation District No. 108, 111 U.S. 701, 4 S. Ct. 663, 28 L. Ed. 569; Davidson v. New Orleans, 96 U.S. 97, 24 L. Ed. 616; Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369.

Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions and the judgment of the trial court is accordingly affirmed.

APPENDIX B

JUDGMENTS BELOW

1. JUDGMENT OF AFFIRMANCE

[Caption Omitted]

Judgment.

Twenty-Fourth Day, July Term, Wednesday, August 15th, 1962.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

2. ORDER DENYING REHEARING

[Caption Omitted]

Order denying appellants' petition for rehearing.

Second Day, September Term, Tuesday, September 11th, 1962.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 550

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; DE LUXE CHECK PRINTERS, INCORPORATED, ET AL., *Petitioners,*

v.

THE CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, COUNTY ATTORNEY OF WYANDOTTE COUNTY, KANSAS; JAMES L. CONROY, COUNTY CLERK OF WYANDOTTE COUNTY, KANSAS, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement Of The Case

This case is the second effort by the petitioners for a Writ of Certiorari involving the same facts.

This Court declined to review the first petition.[1] The only difference between this petition and the first is that this petition is to review the judgment of the United States

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[1] *Girten Investment Co., et al.* v. *State of Kansas ex rel. John Anderson, Jr. et al.*, 363 U.S. 831. As noted in footnote 1 of the Petition, two plaintiff corporations in this case were parties to the *Girten Investment Company* case and four new corporations have joined as plaintiffs in this case.

Court of Appeals for the Tenth Circuit while the Petition in Case No. 909 was to review the judgment of the Supreme Court of the State of Kansas.

The Fairfax Industrial District is an area of approximately 2,500 acres which lies north and east of Kansas City, Kansas, completely surrounded by the city boundaries and the Missouri River. For years the city has extended benefits to the area including water, light, power and other municipal services. The district is an urban area with substantial economic and sociological ties to Kansas City.[2]

In early 1958, Kansas City, acting under authority of Kansas General Statutes 13-1602, 1949, and in keeping with the Kansas Supreme Court's interpretation thereof, enacted Ordinance 41525,[3] which annexed approximately 190 acres of the area including property owned by the petitioners.

In Kansas the rule is well settled that any attack on an annexation ordinance, since it involves the corporate existence of a municipal corporation, may be brought only by the state in a *quo warranto* proceeding on relation of the attorney general or, under him, by the county attorney.[4]

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[2] *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 872, 317 P.2d 806.

[3] Adopted March 25, 1958. The cited statute confers several grants of authority on the city to achieve annexation. Under one branch of authority, the city may annex any amount of unplatted land which "lies within (or mainly within) any city." Pursuant to the interpretation of this phrase by the Kansas Supreme Court, *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P.2d 806, requiring a common perimeter with the city boundary of more than 50% of the total perimeter of the annexed area, Kansas City adopted Ordinance No. 41525. The approximately 190 acres annexed had an entire perimeter of 11,222.16 ft., of which 5,732.54 ft., or more than 50% comprised a common boundary with the city at the time of annexation. The Kansas Supreme Court had recognized the area as unplatted land. *Id.*, 181 Kan. 870, 875.

[4] G.S. Kan. 60-1603; *Smith* v. *City of Emporia*, 168 Kan. 187, 190 P. 2d 101, collects the cases and sums up that "the rule founded on public policy ... has been the settled law of this state for more than half a century...."

Such a *quo warranto* proceeding must be brought within one year after the adoption of an annexation ordinance.[5]

In 1958 the County Attorney commenced a *quo warranto* proceeding on behalf of the state to test Ordinance No. 41525.[6]

The defendants were Kansas City and Quindaro Township, which formerly had jurisdiction over the annexed tract. Following pleadings by the parties, the Kansas Supreme Court appointed a Commissioner on June 30, 1959 to hear evidence and recommend findings. In July, the State's Attorney General came into the case. Having reached the view that the statutory annexation conditions had been met, that the common perimeter of the city and tract boundary was more than 50% of the total tract boundary, that there were not sufficient grounds for maintenance of the action, and that in view of the expense involved in previous cases prosecution in this case amounted to an harassment of the city, he concluded that it would be in the public in-

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[5] G.S. Kan. 12-502(c).

[6] Ordinance No. 41525, briefly described in footnote 3 above, and set out in full at page 11 of the Transcript of the Record, is the primary ordinance involved, notwithstanding mention by petitioners of six ordinances (Petition, p. 5, 8). Ordinance No. 41358 of December 10, 1957, was repealed by No. 41525, thus eliminating a dispute over the description of the boundaries of the annexed area and slightly reducing its size; and passage of No. 41427, which covered a small portion of the tract in the repealed ordinance, was abandoned after its first reading of January 14, 1958. Hence the meaning of the city's "admission" in the pleadings respecting these two repealed and abandoned ordinances was obviously not "invalidity" as claimed by petitioners (Petition, pp. 4, 16), but "nonexistent" and therefore not relied upon for validity of the annexation. Ordinances No. 41557 of April 15, 1958, No. 41659 of June 24, 1958 and No. 41700 of July 22, 1958, each involved a small portion of less than 20 acres of the tract covered by No. 41525 and were adopted under a second branch of the statutory authority (G.S. 13-1602) authorizing annexation of less than 20 acre tracts. These were adopted out of an abundance of caution and were not and are not necessary for the support of the annexation made in this case.

terest to terminate and dismiss the action.[1] Accordingly, on July 22, 1959 the Attorney General moved to intervene and supersede the county attorney, to remove Quindaro Township from the case as having no justiciable interest, and to dismiss the action.

At a hearing before the Commissioner, in August 1959, the county attorney affirmed his acquiescence in being superseded. The township asked for a stay against the Attorney General. Four private corporations, Girten Investment Company, Phillips Petroleum Company, Sealright-Oswego Falls Corporation, and Union Pacific Railroad Company, the four of whom were petitioners in No. 909, asked for leave to intervene and to maintain the action themselves as relators for the state alleging that otherwise their property would be subjected to municipal taxes levied, and to municipal burdens imposed, by Kansas City with no opportunity to have the issue of whether the annexation was void determined by the court.

The Commissioner concluded that the Attorney General could not supersede the county attorney and dismissed the case, that Quindaro Township could maintain the action to a final conclusion, and were it not for these conclusions

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[1] *State ex rel. Foster* v. *City of Kansas City*, 186 Kan. 190, 350 P.2d 37. In the Kansas Attorney General's reply to Quindaro Township's Motion for Rehearing in that case, John Anderson, then Attorney General, stated: "In the second annexation case (181 Kan. 870) the court defined the words 'mainly within' as a condition upon which annexation is sanctioned by G.S. 1959 Supp., 13-1602a. It was there stated that those words call for a common perimeter of more than fifty per cent. By that it meant that so much of the City's present limits which touch the tract to be annexed must be more than one-half the total boundary of the tract sought to be annexed. As stated in the Attorney General's argument in this case, it was his opinion that this condition was fully met by the ordinance in question, and that there was no sufficient ground for the maintenance of the action; and that in view of the expense incurred in the previous case, the further prosecution of this case amounted to an harassment of the city. He therefore concluded that it was his duty to enter this case and to cause the same to be dismissed."

the four corporations might be allowed to intervene and maintain the action.[8]

The Kansas Supreme Court in its unanimous opinion of March 5, 1960[9] disagreed with these conclusions. The court held that the Attorney General could, as a matter of law, and did in fact supersede the county attorney; and "If, therefore, the Attorney General considered the action unmeritorious, he not only had the authority but he also had a duty to move for dismissal."[10] The court further held that neither Quindaro Township nor the individual intervenors had any status to question the city's annexation of new territory "which is a reorganization of the city that in turn involved its corporate validity. Such an attack can only be made by the state."[11] The court terminated the proceeding by ordering the case dismissed.[12] A petition for a Writ of Certiorari based on the same contentions as now presented herein was denied by this Court on June 20, 1960.[13]

On March 1, 1961, almost three years after the passage of Ordinance No. 41525, the Petitioners filed the complaint involved here in the United States District Court for the District of Kansas.[14] Petitioners claim among other things a right in themselves as individuals to an adjudication by a court as to the validity of the annexation ordinances.[15]

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[8] *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 199, 350 P.2d 37, 43.

[9] *Ibid.*

[10] 186 Kan. 190, 197, 350 P.2d 37, 42.

[11] Citing the Kansas cases and those of other jurisdictions, 186 Kan. 190, 198, 350 P.2d 37, 43.

[12] 186 Kan. 190, 199, 350 P.2d 37, 44.

[13] *Girten Investment Co., et al.* v. *State of Kansas ex rel. John Anderson, Jr.,* 363 U.S. 831.

[14] Transcript of the Record 1-9.

[15] See Petition pp. 11-12.

The defendant City answered setting up the fact that Phillips Petroleum Company and Sealright-Oswego Falls Corporation had raised exactly the same contentions in the original action in the Kansas Supreme Court and in this Court;[16] that all procedures followed in the enactment of all the ordinances were exactly the statutory procedures specified by the laws of Kansas, which had been approved by the Kansas Supreme Court;[17] and that the Attorney General had concluded that an action to challenge the ordinances was unmeritorious since the formula spelled out by the Kansas Supreme Court[18] had been followed. The city further answered that there was no abuse of due process since the Kansas statutes provide a complete pattern of legislative and administrative process coupled with discretionary resort to judicial review, if review is warranted in the judgment of the proper officers of the State.[19] The defendant Foster, county attorney, answered setting out that in the sound exercise of his discretion, he had determined that a judicial review of the attacked ordinances was not warranted and that there were no legal objections to any of the ordinances set out in the complaint.[20]

The United States District Court for the District of Kansas dismissed the action upon the grounds that plaintiffs, under Kansas law, had no standing to maintain the action and had presented no justiciable question under federal law.[21]

The United States Court of Appeals for the Tenth Cir-

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[16] Transcript of the Record 36; see also, *supra*, Note 1.

[17] *State ex rel. Fatzer* v. *City of Kansas City*, 169 Kan. 702, 222 P.2d 714.

[18] *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P.2d 806.

[19] Transcript of the Record 37.

[20] *Id.* at 35.

[21] Petition, Appendix A 3.

cuit affirmed the decision of the district court stating that neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions.[22]

ARGUMENT

I

The Issue

As stated by petitioners at page 4 of the Petition for Certiorari:

> "This case involves a second effort on petitioner's part to obtain a judicial hearing on and a determination of their claims under the Fourteenth Amendment to the Constitution of the United States."

Petitioners also concede on page 16:

> "It is, of course, true that the merits of the controversy depends entirely on state law."[23]

The issue in this case is identical with the issue previously adjudicated in the Kansas State Courts and which this Court declined to review on Petition for Certiorari.[24]

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[22] *Id.* at A 7.

[23] Rulings by the highest court of the state on questions of state law are conclusive upon the Supreme Court of the United States. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 176. Furthermore, the lack of substance in the present petition is further demonstrated by the statement of Petitioners in their original Petition to this Court (No. 909, 1959): "Petitioners have throughout this litigation conceded, and now concede, that had the legislature of Kansas passed a statute in precisely the same language as that of the ordinance here sought to be attacked, they would have no basis for complaint." A similar concession is made by Petitioners at p. 14 of their Petition in this case.

[24] 363 U.S. 831.

Namely, is the exercise by a municipality of the legislative function of annexation subject to challenge in a court by private parties having no individual standing to do so under state law, and further, if their right to challenge is denied does this comport with due process and equal protection of the laws?

After certiorari was denied in the former case, *supra*, another demand was made upon the County Attorney of Wyandotte County to initiate further proceedings and upon refusal, this action was filed in the United States District Court for the District of Kansas. The element supposed to allow petitioners to prevail here where they failed before is that instead of the writ being directed to the Supreme Court of Kansas as before, it is now to be directed towards the United States Court of Appeals for the Tenth Circuit.[25] However, the doctrine of *res judicata* operates as a bar to this action in the Federal Courts since the case has already been decided in the Supreme Court of Kansas and this Court has already denied certiorari.[26]

This action is also barred by a Kansas statute which prohibits its maintenance even by the Attorney General or county attorney after one year has elapsed from the time the ordinance was enacted.[27]

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[25] A clear admission that the same issue previously adjudicated is again presented herein is found at page 2 of Petition for Certiorari wherein it is stated:

> Thereafter (after certiorari was denied in Case No. 909), petitioners making the same challenge and the same Federal Constitutional contentions in a Federal district court . . . were held not to present any justiciable issues and to lack standing to sue.

[26] *Angel* v. *Bullington*, 330 U.S. 183; *Grubb* v. *Public Utilities Commission of Ohio*, 281 U.S. 470.

[27] Kan. G. S. 12-502(c)(1957 Supp.).

II

Reasons For Denying The Writ

A. *Petitioners Have No Standing To Maintain This Action.*

In Kansas, as in many other states, the rule is well settled that an attack on an annexation ordinance may be made in a *quo warranto* action against the annexing municipality but brought only by the state in the discretion of its proper officers.[28] The latter are limited to the State Attorney General or the county attorney, but a county attorney may be superseded by the State Attorney General as has occurred in this case.[29] In this case both of the officials having the authority to do so, i.e., the Attorney General and the county attorney, have officially concluded there is no merit in Petitioner's claim herein and have, in the exercise of their discretion, taken that position in the courts where those claims have been advanced. And, as already stated, *supra,* even these officials are prohibited by a Kansas Statute (G. S. 12-502(c)) from challenging the annexation ordinance in question at any time more than one year after its adoption in 1958.

Sound public policy requires limiting such actions to state officials. When an annexation ordinance is attacked in the courts, the corporate existence of a municipality is questioned, and to allow any and all disgruntled individuals to launch such an attack would lead to uncertainty and

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[28] See G.S. 60-1603; *Smith* v. *City of Emporia, supra,* Note 4; *Lampe* v. *City of Leawood,* 170 Kan. 251, 225 P. 2d 73. An array of like authorities in other states is collected in 13 A.L.R. 2d 1279.

[29] See *State ex rel Foster* v. *Kansas City,* 186 Kan. 190, 350 P. 2d 37; *State* v. *Finch,* 128 Kan. 665, 280 P. 910.

interminable confusion in city affairs and result in a breakdown of municipal government.[30]

Accordingly, an individual property owner and taxpayer in Kansas has no standing to sue in an action to question an annexation ordinance, either directly or collaterally.[31]

Petitioners have conceded that the merits of the underlying controversy depend entirely on state law.[32] *They have therefore, conceded that they have no Federal right or standing to maintain this action.*[33]

Petitioners' contention that they have been denied "a hearing anywhere" with regard to this matter[34] is difficult to understand. The decision of the Tenth Circuit Court of Appeals[35] contains ample evidence that they have indeed, been heard on their right to challenge, in practically every court in Kansas, both State and Federal. In addition, the laws of Kansas appropriately provide normal due process safeguards.[36]

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[30] See *Smith* v. *City of Emporia, supra,* Note 4; *Topeka* v. *Dwyer,* 70 Kan. 244, 78 P. 417. Only the state acting in direct proceedings can challenge the validity of a municipal corporation. *Shapleigh* v. *San Angelo,* 167 U.S. 646, 655-656; *Tulare Irrigation District* v. *Sheppard,* 185 U.S. 1, 14.

[31] See *Smith* v. *City of Emporia, supra,* Note 4; *Lampe* v. *City of Leawood, supra,* Note 28; *Topeka* v. *Dwyer, supra,* Note 30; *Gardner* v. *Benn,* 81 Kan. 442, 105 P. 435; Kan. G. S. 60-1603. Petitioners argument that they are entitled, as of right, to a court test of the annexation ordinance ignores the holdings of this Court that process, other than a judicial determination, is due process in the consummation of political boundary line changes and the imposition of tax burdens. *Kelly* v. *Pittsburgh,* 104 U.S. 78; *Hagar* v. *Reclamation District No. 108,* 111 U.S. 701; *Davidson* v. *New Orleans,* 96 U.S. 97; *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112.

[32] Petition, p. 16.

[33] See *Smith* v. *City of Emporia, supra,* Note 4; *Hunter* v. *Pittsburgh, supra,* Note 23

[34] Petition, p. 16.

[35] *Id.,* Appendix A.

[36] Under Kansas law a city may annex territory, pursuant to certain standards prescribed by general statutes, and after notice to county officials

No amount of camouflage can conceal the fact that Petitioners are once again asking this Court to overturn decision and policy carefully evolved by the courts and legislature of Kansas in order to improvise for Petitioners a private individual judicial remedy in place of the established remedy (combining the legislative, administrative and judicial aspects summarized, infra), simply because they have disagreed with the representative of the State, the Attorney General of Kansas, and with the County Attorney on the desirability of resorting to judicial review. Historically for good and sound policy reasons individual standing to challenge has been withheld in favor of legal officers of the state who are clothed with discretion to challenge where appropriate.[37] Obviously, the proposed improvisation of Petitioners is beyond the scope of action by this Court. What Petitioners are asking for is a discrimination in their favor as compared to the 130,000 other property owners of Kansas City.

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and two public meetings, which affords opportunity, in the first instance, for persons concerned to be heard and to support or oppose the proposal, if they desire, before the governing body of the city. Kansas G.S. 13-1601, 13-1602; 13-2901, 13-2902, as revised L. 1959 Ch. 64. Thereafter, if the annexation is consummated, the law reposes in the State Attorney General, or under him the county attorney, authority to administratively determine that the city has complied with the requirements of law. That official is open to persuasion by private persons that the municipal action was proper or improper, but the judgment is his. If, in his judgment, there has been no failure of compliance, that is the end of the matter. If the Attorney General, or under him, the county attorney, is of the view that the action taken was or may have been in violation of law, he may, on behalf of the state, within one year, bring an action in *quo warranto* and obtain a judicial decision. Thus, there is a complete pattern of legislative and administrative process, coupled with discretionary resort to judicial review if review is warranted in the judgment of the public officers in charge.

[37] See *supra*, Note 28.

B. *Petitioners Raise No Substantial Federal Question*

This Court has held repeatedly that the State may expand or contract the territorial area of municipal corporations with or without the consent of the citizens who reside therein or even against their protest and that it may do so "unrestrained by any provision of the Constitution of the United States."[38] Specifically, this Court has rejected the contention that the Fourteenth Amendment was violated by such state action.[39]

Petitioners' principal attack in this case was directed at the validity of the Kansas City ordinance and was limited to the claim that the ordinance violates state law. It is well established that federal courts do not review such a claim.[40] Furthermore, even in the event of error in the administration of state law, it is not a matter of federal judicial cognizance under the due process clause of the Fourteenth Amendment, where, as here, a state has provided and determined the ways and means of procdures for the annexation of property by municipalities and the safeguards necessary to protect against abuse. The following language from the case of *Hunter* v. *Pittsburgh, supra,* is most enlightening in this respect:

> We have nothing to do with the policy, wisdom, justice or fairness of the Act under consideration of those to whom the State has entrusted its legislative power and their determination of them is not subject to review or criticism by this Court. . . .
>
> Municipal corporations are political subdivisions of the State. . . For the purpose of executing these powers

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[38] *Hunter* v. *Pittsburgh,* 207 U.S. 161, 179.

[39] *Hunter* v. *Pittsburgh, Ibid; Kelly* v. *Pittsburgh, supra,* Note 31 and other cases cited at 207 U.S. 178.

[40] *Hunter* v. *Pittsburgh, supra,* Note 23.

> properly and efficiently they usually are given the power to hold... property. The number and nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised, rests in the absolute discretion of the State . . . The State, therefore, at its pleasure may modify, withdraw all such powers, may take without compensation such property, hold itself or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the Charter and destroy the corporation . . . In all these respects, the State is supreme, and its legislative body conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason . . . the power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[41]

Try as they might, Petitioners are unable to reasonably distinguish this case from the law of *Hunter*. They contend once again as they did in their prior case involving the same conflict,[42] that they are entitled to be heard on the question of whether or not Kansas City properly exercised delegated powers.[43] This contention is unsupportable because in delegating annexation powers to Kansas City, the State has reserved to itself through the county Attorney

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[41] *Hunter* v. *Pittsburgh*, 207 U.S. 161, 176, 178, 179; see also *Hagar* v. *Reclamation District*, No. 108, 111 U.S. 701.

[42] 363 U.S. 831.

[43] Petition, p. 14.

or through the Attorney General, the right to question the manner of the delegate city doing what the state itself could do unhampered by the Fourteenth Amendment.[44] It therefore is difficult to perceive any individual being deprived of due process of law, if the state chooses not to question the exercise of such powers. It is also difficult to understand how any single individual in the state has been deprived of equal protection of the laws, when the laws, with propriety, have conferred on no individual the right to challenge, but have reserved the right to the state acting through designated officials. Simply because the state has brought a testing action in some cases, does not mean that failure to bring, or continue such action in others is a denial of "equal protection of the laws."[45]

The case of *Gomillion* v. *Lightfoot*, 364 U.S. 339 cited by Petitioners is obviously not in point. It involved the Fifteenth Amendment whereas Petitioners are relying upon the Fourteenth Amendment in this case. Furthermore, as

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[44] See *supra*, Notes 4 and 41.

[45] Petitioners, in support of their contention that their "federal claims are substantial," allege that the action of the Attorney General and then of the County Attorney in denying Petitioners "any opportunity for judicial determination" was arbitrary and is in itself a denial of any meaningful equality under the law. The allegation of Petitioners (Petition, p. 13) that each of the six challenged ordinances is severally illegal, was never admitted by Respondent and certainly it was never supported. The District Court in disposing of the allegation that the County Attorney acted arbitrarily, stated in effect that it was the contention of the Petitioners that upon request of the County Attorney to prosecute such an action, the County Attorney should commence an action and if he refuses he is arbitrary and capricious. As characterized by the District Court, this is nothing more than pleading a "bald conclusion unsupported by a factual allegation and it cannot save an otherwise fatally defective pleading." While it is true that the County Attorney did not bring *quo warranto* proceedings, this is understandable due to the fact that in the earlier action, the County Attorney had been superseded by his superior, the Attorney General, and the proceedings dismissed "in the public interest." That being the case, the refusal of the County Attorney to refile the same action here cannot be characterized as being arbitrary.

admitted by Petitioners [46] there is in this case no constitutional deprivation by the act of annexation itself, as occurred in the Gomillion case.[47] However, the following statement by Justice Frankfurter in *Gomillion* is helpful in further explaining the law applicable to this case:

> If one principle clearly emerges from the numerous decisions of this Court dealing with taxation, it is that the due process clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a state exercise of its political powers.[48]

Justice Frankfurter explained the holding in the *Hunter Case* as being:

> . . . That a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of its city with another. [49]

The cases of *Young* v. *Ragen* [50] involving *habeas corpus* and the Illinois State Courts, and *Brinkerhoff-Faris Company* v. *Hill* [51] involving a tax assessment on certain bank stock and the Missouri Supreme Court, though relied upon by Petitioners, are not in point here, either from a substantive or procedural view. The posture of this case and these two cases are certainly not the same since Petitioners

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[46] Petition, p. 14.

[47] In *Gomillion* it was charged that the state legislature misused its powers in fixing municipal boundaries as a device to cut off voting rights of a group of its Negro citizens.

[48] 364 U.S. 339, 343.

[49] *Id.* at 342.

[50] 337 U.S. 235.

[51] 281 U.S. 673.

are presently attempting to come from a Federal Circuit Court of Appeals and not from state courts.

Petitioners have not alleged, and cannot in truth point to any special or peculiar injury to their property or personal rights which would call for deviation from the pattern of procedure provided by Kansas in this case. Petitioners will be paying the same taxes paid by all residents of Kansas City. No discrimination against Petitioners is alleged. Petitioners have merely assumed throughout their argument that subjection of their property to nondiscriminatory reasonable taxation by Kansas City (in place of Quindaro Township) is an injury and a sufficient injury to call for federal intervention. This is contrary to the rulings of this Court,[52] and petitioners' request for federal intervention goes beyond the settled limitations of federal jurisdiction in this regard.[53]

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[52] *Hunter* v. *Pittsburgh, supra,* Note 38.

[53] As succinctly stated by the Tenth Circuit Court of Appeals (Petition A 7): "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercises of a state's political functions."

CONCLUSION

It is respectfully urged that the petitioners are without standing to maintain their complaint, and that their petition raises no substantial federal question which would entitle them to invoke the jurisdiction of this Court.

Respondents respectfully request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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